Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ANTHONY MORELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can funds that were acquired during a scheme to evade the payment of taxes and that were subsequently wired be "proceeds" of a "specified unlawful activity" for the purposes of the federal money laundering statute, 18 U.S.C. § 1956, even though tax crimes are excluded from the definition of "specified unlawful activity," and even though the subsequent wire transfers of the funds did not generate, produce or yield any "proceeds" other than those the defendant had already acquired by tax evasion?

2. Should this Court resolve a conflict among the circuit courts of appeals on the issue of what constitutes "proceeds" for purposes of the federal money laundering statute?

LIST OF PARTIES

The defendants named in the original indictment were petitioner Anthony Morelli, Joseph Maritato, Edward Dougherty, John Sorrentino, Anthony Zummo, Gregory Federico, Victor Zilber, Mela Rubinov, Arkady Seifer, Igor Roizman, Jacob Dobrer and George Doddy. Thereafter, a superseding indictment was returned naming petitioner, Joseph Maritato, John Brogna, Anthony Zummo, Gregory Federico, Victor Zilber, Mela Rubinov, Arkady Seifer, Igor Roizman, Jacob Dobrer, Vyacheslav Dobrer and George Doddy. Only petitioner, Gregory Federico and Igor Roizman proceeded to trial. After a jury trial, petitioner and his co-defendants were convicted of a variety of crimes, including violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the federal statutes prohibiting extortion, mail and wire fraud, and money laundering.

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Appendix C — Opinion Of The United States District Court For The District Of New Jersey Dated And Filed February 26, 1996 ..... 59a

Petitioner Anthony Morelli respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, affirming the calculation of his sentence for violating the RICO statute under the sentencing guidelines for money laundering, even though the "specified unlawful activity" described in the indictment did not generate any "proceeds" that were laundered, and even though petitioner was never convicted of money laundering nor named in any racketeering act alleging money laundering.

OPINIONS BELOW

The Court of Appeals' opinion affirming petitioner's conviction and sentence is reported at 168 F.3d 798 (3d Cir. 1999) (App. A). The opinion of the District Court in *United States v. Morelli*, Crim. No. 93-210 (WGB) (D.N.J. Feb. 26, 1996) is not published, but is reproduced in the appendix (App. C).

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on March 9, 1999 (App. B).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this appeal is 18 U.S.C. § 1956. The subparts of that statute most pertinent to this appeal are:

18 U.S.C. § 1956(a)(1):

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity — (A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . . (B) knowing that the transaction is designed in whole or in part — (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . [is guilty of money laundering].

18 U.S.C. § 1956(c)(7)(A):

> [T]he term 'specified unlawful activity' means any act or activity constituting an offense listed in section 1961(1) of this title . . . .

Tax fraud is not a "specified unlawful activity" under § 1961(1), and the term "proceeds" is not defined in 18 U.S.C. § 1956.

INTRODUCTION

This case of national importance raises, in sharp focus, issues of statutory interpretation which have bedeviled the federal courts for years.

In this case, the petitioner — a 57 year old man — was sentenced according to the sentencing guideline applicable

to money laundering crimes, even though the indictment did not name him as a defendant in any money laundering count or money laundering racketeering act, and even though the specified unlawful activity described in the indictment did not itself create any proceeds to launder. The result was an increase in the petitioner's sentence from 10 years to 20 years, *i.e.*, a virtual life term.

In affirming the use of the money laundering guidelines to calculate the petitioner's sentence, the Third Circuit's opinion created "proceeds" for the purposes of the money laundering statute where there were none, by interpreting the word "proceeds" expansively, and ignoring the fact that the wiring of funds described in the indictment simply did not result in the petitioner and his co-defendants obtaining any funds beyond those they had previously acquired through their tax fraud scheme. In doing so, the Court of Appeals improperly expanded the meaning of "proceeds" well beyond the meaning intended by Congress when it enacted the money laundering statute, and issued a decision that conflicts with the decisions of other circuits.

In this case, the only scheme that created "proceeds" for Morelli was his tax fraud scheme. If the Court accepts the Third Circuit's reasoning, then any tax fraud scheme in which wire transfers are used to move the proceeds of the tax fraud will become a money laundering case, and tax fraud will have become a "specified unlawful activity" by judicial sleight of hand rather than legislative enactment.

STATEMENT OF THE CASE

A. The Charges Against Morelli

The original indictment charged Morelli in 43 counts, consisting of one count of racketeering conspiracy, one count of racketeering, fourteen counts of extortion, three counts of collection of credit by extortionate means, twelve counts of mail fraud, ten counts of money laundering, one count of conspiracy and one count of conspiracy to commit the crime of money laundering. (R 42).[1] Morelli moved, *inter alia*, to dismiss the money laundering and money laundering conspiracy counts contained in the original indictment. (R 141).

The Government responded by presenting two superseding indictments to the grand jury. (R 159). The second superseding indictment (the "indictment"), on which petitioner was tried, charged Morelli with a variety of crimes. (R 165). The indictment did not charge Morelli with money laundering,[2] nor did it charge him with any racketeering act alleging money laundering. In addition, Morelli was not named in any substantive counts of wire fraud, *i.e.*, the "specified unlawful activity" described in the second superseding indictment's money laundering counts. However, the superseding indictment did charge Morelli with conspiracy, in violation of 18 U.S.C. § 371, and alleged that money laundering was one of three objects

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1. Citations to the Appendix in the Third Circuit are denoted "R __," and the page numbers in such citations refer to the page number of the appendix filed in connection with Morelli's appeal to the Third Circuit.

2. The superseding indictment did, however, charge a number of Morelli's co-defendants with money laundering.

of the conspiracy. The other objects of the conspiracy count were mail and wire fraud. (R 230).

B. The Trial

In this case, the Government proved that Morelli and his co-defendants organized a series of "shell" companies into a "daisy chain," for the purpose of evading the payment of excise taxes on the sale of fuel. During the conspiracy, the companies in the "daisy chain" sold "bootleg" fuel to each other through the chain in a series of paper transactions. After the fuel was sold to the last company in the chain, which was known as the "street company," that company would sell it to a legitimate retailer at a discounted price that was below the "tax-included" market price. The proceeds of the street company's sale would then be sent back through the series of companies in the "daisy chain" by means of a series of wire transfers. (10a).[3]

One of the companies, known as the "burn company," was located in the middle of the "daisy chain." It was legally obligated to collect the excise taxes on the fuel sales and transmit them to the Government. After the proceeds of the fuel sales were wired through the "burn company," however, it would not pay the required excise taxes to the Government, permitting Morelli and his co-conspirators to keep the funds they earned from their sales of fuel to legitimate retailers, without ever collecting the taxes on those sales. (11a).

At trial, the Government did not introduce any evidence to show that Morelli participated in any of the money laundering transactions alleged in the indictment. Indeed,

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3. References to the Appendix are in the form "__a."

the Government did not even offer any proof that Morelli discussed the alleged money laundering transactions with any of his co-conspirators. None of the defendants charged with committing money laundering crimes and racketeering acts relating to money laundering even stood trial with Morelli. Moreover, the Government did not even introduce evidence to show that Morelli participated in the substantive counts of wire fraud that were charged as the "specified unlawful activity" supporting the money laundering counts in the indictment. Thus, there was no evidence that Morelli participated directly in any aspect of the money laundering activity described in the indictment.

Morelli was ultimately convicted of racketeering conspiracy, racketeering, extortion,[4] conspiracy to commit extortion, mail fraud, and the conspiracy count that included money laundering as an object of the conspiracy. (R 351). He was acquitted of a series of mail fraud charges. *Id.* Thus, the sole connection between Morelli and the alleged money laundering described in the indictment was his conviction on a conspiracy count in which money laundering was one of three different objects of the alleged conspiracy, and his conviction on a RICO count that included his co-defendants' money laundering activities as racketeering acts.[5]

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4. The "extortion" Morelli stands convicted of was principally based on the threat of economic harm to the businesses of others, in the form of a "price war" for fuel. At trial, there was no testimony or other evidence indicating that Morelli committed any act of physical violence in furtherance of the "daisy chain" schemes described in the indictment.

5. Curiously, the jury's verdict form found Morelli liable for the racketeering acts that alleged money laundering activity, even

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C. The Sentencing Proceedings

Although Morelli's connection to the money laundering charges in the indictment was extremely attenuated, the District Court followed the recommendation of the Probation Department and applied the money laundering guidelines in calculating Morelli's sentence. The result was a dramatic increase in Morelli's sentencing exposure.

The Probation Department calculated Morelli's sentencing guidelines by separating the charges on which he was convicted into three categories: 1) crimes sounding in extortion; 2) crimes sounding in fraud; and 3) crimes sounding in money laundering. Morelli's base offense level in connection with the extortion crimes was 24. His base offense level in connection with the fraud crimes was 30. His base offense level in connection with the money laundering crimes was 39. (43a).

Because the base offense level associated with the money laundering crimes was so much higher than the level associated with the other groups, Morelli's final base offense

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though Morelli was not named in those acts. In its sentencing opinion, the District Court speculated that Morelli's

> liability for those acts is apparently based on the jury's determination that (i) he had agreed to be a member of the RICO conspiracy; (ii) his coconspirators agreed that money laundering offenses would be committed in furtherance of the conspiracy; and (iii) the commission of the money laundering offenses was foreseeable.

(42a).

level was not increased to account for the crimes associated with his alleged extortions and frauds — *i.e.*, the crimes he was actually convicted of committing. With a base offense level of 39, the Probation Department calculated Morelli's sentencing range as 324-405 months. (43a).

The dramatic impact of the money laundering calculations is starkly demonstrated by re-calculating Morelli's sentence based on the fraud and extortion calculations alone. If the Probation Department had calculated Morelli's sentencing guidelines by grouping his crimes into only two categories relating to fraud and extortion, Morelli's final base offense level would have been 30, and his sentencing range would have been 121-151 months. (43a). Thus, using the money laundering guidelines more than doubled Morelli's sentencing exposure, even though Morelli's connection to the money laundering conduct charged in this case was minimal at best.

Morelli objected to use of the money laundering guidelines, arguing, *inter alia*, that the Government had not proven the money laundering charges at trial because it had not proven that the alleged laundering involved the "proceeds" of a specified unlawful activity. (R 372-73). Morelli also moved for a downward departure, requesting that the District Court sentence him based on the fraud guidelines, since those guidelines more appropriately described conduct on which he was convicted.[6] (R 378).

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6. As Morelli pointed out in the District Court and again on appeal, even though the Government had prosecuted many "daisy chain" conspiracies before this one, this is the *only* such case in which money laundering counts were charged and the *only* such case in which a RICO conspirator's sentencing guidelines were enhanced using the money laundering guidelines. Morelli's research indicates that his case continues to be unique in this regard.

In sentencing Morelli, the District Court observed that

> what it [Morelli's case] comes down to, basically what we're talking about here is tax fraud. That's really what's happening here. The non-payment of taxes that are due, and the elaborate scheme that's created to prevent that . . . .

(R 494). Despite its reservations, the District Court refused to find that the Government had not proven the money laundering charges in the indictment. However, the District Court did conclude that the resulting sentence overstated the seriousness of Morelli's crime, and therefore departed downward a total of three base offense levels when calculating Morelli's money laundering guidelines base offense level. (58a).

After ruling on other sentencing issues, the District Court ultimately found that Morelli's final base offense level was 36, and that, at that level, his sentencing range was 235-293 months. (58a). On this basis, the District Court imposed a sentence of 240 months on Morelli. (62a). Thus, Morelli's ultimate sentence, even after the District Court's downward departure, was almost twice what it would have been if the District Court had employed the fraud guidelines — which were clearly the most applicable to Morelli's actions — to calculate Morelli's sentence.

D. Proceedings In The Third Circuit

1. *Morelli's Argument*

In the Third Circuit, Morelli continued to argue, *inter alia*, that even if the proceeds of the fuel sales described in

the indictment were "proceeds" of a fraudulent scheme, the scheme that generated the "proceeds" was a scheme to avoid the payment of excise taxes. Thus, Morelli argued, no "proceeds" were created by the subsequent wirings of funds that were described in the indictment. (3a). Therefore, the only proceeds in this case were generated by a crime — tax fraud — that was not a "specified unlawful activity" sufficient to serve as a predicate for a money laundering charge. *Id.* In pressing this argument, Morelli noted that a wire fraud may be established without any proof that the wire fraud generated any illicit profit, and emphasized that the Government had argued this point in the District Court. (16a).

2. *The Court Of Appeals' Opinion*

In affirming the judgment of the District Court, the Third Circuit began by acknowledging that, when the "street company" initially sold "bootleg" fuel to a retailer, the "street company" acquired the proceeds of a tax fraud, not a wire fraud (20a). Specifically, the Court noted

> We think it is obvious that the money that the [conspirators] fraudulently obtained [by their initial sale of fuel through the "street company"] does not "result, proceed, or accrue" from this single series of wirings, and therefore the money is not the proceeds of a wire fraud. Within the individual series of transactions, the money is the proceeds of fraud simpliciter at the time it enters the Association's hands [through the "street company"]. The later wirings do not change its character into the proceeds of wire fraud (17a).

The Court of Appeals went on, however, to find that the funds acquired by the "street company" from *subsequent* sales of bootleg, "tax free" fuel *were* the proceeds of a wire fraud scheme, even though Morelli's purpose in establishing the "daisy chains" that sold the fuel was always to evade the payment of excise taxes. In making this ruling, the Court of Appeals *sua sponte* created a theory to support the Government's money laundering allegations that had *never* been described in any of the indictments, and that had *never* been argued by the Government at Morelli's trial, his sentencing, or his appeal. That theory was expressed as follows:

> the money [acquired by Morelli and his codefendants] was the proceeds of the *entire* ongoing fraudulent venture . . . . Although each series [of wire transfers] may have included discrete acts of wire fraud that followed the creation of the proceeds related to that series, the fact is that the entire program, encompassing all of the acts charged in the indictment, constituted one large, ongoing wire fraud scheme. Each wiring in each series furthered the execution of each and every individual act of tax fraud, and helped to create the proceeds involved in each succeeding series of transactions. This is primarily because each wiring, whether it occurred before or after a given act of tax fraud, served to promote and conceal each individual embezzlement of taxes, either *ex ante* or *ex post*. More precisely, each wiring, including those that occurred before a particular transaction, made it more difficult for the government to detect the entire fraudulent scheme or any particular

> fraudulent transaction or series of transactions. In sum, the money gained in each series of transactions (save the initial one) was the proceeds of wire fraud because the money was the proceeds of a [tax] fraud that was furthered by the prior wirings (19-20a).

Thus, in the Third Circuit's view, the proceeds of Morelli's ongoing tax fraud scheme were also, simultaneously, proceeds of an ongoing wire fraud scheme, even though the only real profits or "proceeds" earned by Morelli and his conspirators from the scheme were the profits that resulted from their avoidance of excise taxes, and the only reason the wirings charged in the indictment were wire frauds was that those wirings concealed the proceeds of Morelli's tax fraud and thereby furthered his tax fraud scheme.

In formulating this analysis, the Court analogized Morelli's case to that of the defendant in *Schmuck v. United States*, 489 U.S. 705 (1989) (21a). In that case, this Court held that a mailing made subsequent to the completion of one among a series of frauds may be "essential to the perpetuation of [the entire] scheme" because such mailings can be necessary to prevent the discovery of the scheme and thereby keep it operating smoothly. *Schmuck*, 489 U.S. at 711-12. This Court held that the mailings at issue were a sufficient basis to sustain the defendant's conviction under the federal mail fraud statute. *Id.*

In the Court of Appeals' view, the proceeds that were received by the "street companies" in Morelli's "daisy chains" were all the proceeds of wire frauds *after* the initial tax fraud was committed through the use of a "daisy chain,"

even though each individual sale of bootleg fuel by the "street companies" was a tax fraud, and even though the various wire transfers never created any corpus of funds apart from those that Morelli and the other defendants obtained through their tax frauds. According to the Court, this was so because "[e]ach wiring concealed and promoted each and every fraudulent series of transactions by making the entire scheme less detectable," and the money received by Morelli and his coconspirators through the "street companies" was therefore "an acquisition of funds through wire fraud" at the same time the money was received through sales of fuel that were fraudulent because they permitted Morelli and his coconspirators to evade the payment of excise taxes (23a).

The Third Circuit's opinion is thus one large, wobbly circle, in which the funds obtained by a tax fraud scheme are transformed into the "proceeds" of a wire fraud scheme because the wirings "conceal" and "promote" the tax fraud scheme, and in which the newly transformed "proceeds" of the "wire fraud scheme" are then laundered when they are wired from one shell company to another, so that they can be "concealed" and ultimately used to "promote" new sales of bootleg, tax free fuel. The law will not permit a virtual life sentence to be affirmed on this reasoning, which is opposed to both the bulk of the law in the lower courts and common sense.

REASONS FOR GRANTING THE WRIT

I.

BY SENTENCING PETITIONER FOR MONEY LAUNDERING THAT WAS NOT ALLEGED OR PROVEN TO HAVE BEEN COMMITTED, THE DECISION BELOW EFFECTIVELY AND IMPROPERLY REWRITES THE MONEY LAUNDERING STATUTE.

The language of 18 U.S.C. § 1956 explicitly limits the reach of the federal law prohibiting money laundering to transactions that "involve[ ] the proceeds of [a] specified unlawful activity." "Tax fraud" and "tax evasion" are not "specified unlawful activities" for the purposes of 18 U.S.C. § 1956. "Wire fraud" is such a specified unlawful activity, however.

In this case, the Court of Appeals effectively rewrote the statute to punish petitioner for laundering the "proceeds" of tax fraud. Congress never intended this result, and, if followed, the Court of Appeals' reasoning will harshly increase the sentences of tax evaders far beyond what Congress intended.

The opinion below expands the concept of "proceeds" in 18 U.S.C. § 1956 beyond any ordinary understanding of that term, and thereby expands the reach of the federal money laundering statute beyond its well recognized boundaries as set by Congress and interpreted by the courts. As shown below, there simply were no "proceeds" of a wire fraud according to any common understanding of that word, and because there were no such "proceeds," no money laundering transactions took place.

The term "proceeds" is not defined in 18 U.S.C. § 1956, and there is nothing about the use of that term in the statute to suggest that it should have anything other than its ordinary meaning. It is a "fundamental canon of statutory construction[ ] that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994); *Smith v. United States*, 508 U.S. 223, 228 (1993). Black's Law Dictionary defines "proceeds" as "[t]hat which results, proceeds, or accrues from [a] transaction." Similarly, the Merriam Webster Dictionary defines "proceeds" as "the total amount or the profit arising from a business deal." Thus, the term "proceeds" as it is used in the money laundering statute must refer to a *res* or *corpus* of funds that "accrue," "result" or "arise" from a particular crime.

In this case, the money that was wire transferred through the "daisy chain" of shell companies established by Morelli did not "accrue," "result" or "arise" from the wire transfers themselves.[7] As even the Third Circuit acknowledged, at

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7. In fact, as the Government argued vigorously in the District Court, it is possible to commit wire fraud, as Morelli and his co-defendants did in this case, without deriving any "proceeds" from the fraudulent scheme itself. *See, e.g., United States v. DiNome*, 86 F.3d 277, 283 (2d Cir. 1996) (explaining that mail or wire fraud scheme may be complete without loss by victim of scheme); *United States v. Mittelstaedt*, 31 F.3d 1208, 1216 (2d Cir. 1994), *cert. denied sub nom Johnsen v. United States*, 513 U.S. 1084 (1995). Indeed, when it argued in favor of Morelli's sentence in the District Court, the Government argued that the fact that the wire transfers at issue in Morelli's case tended to conceal Morelli's tax fraud

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least with respect to each series of wirings, "the money [was] the proceeds of fraud simpliciter at the time it enter[ed] the [conspiracy]'s hands. The later wirings [did] not change its character into the proceeds of wire fraud" (17a).

The money received by Morelli and his co-conspirators "accrued," "resulted" and "arose" from their sales of fuel to retailers at prices that were below the typical market price because no excise taxes on the fuel had been collected. The fraud that generated the *res* of funds received by Morelli and his co-conspirators was their fraud on the State of New Jersey and the Federal Government, when they represented (through the "burn company") that they would collect and pay over the excise taxes that were due on the fuel they sold, but failed to do so.

Recognizing that the "proceeds" garnered by Morelli and his co-conspirators did not "result," "proceed" or "accrue" in any ordinary sense from the wirings described in the indictment, the Third Circuit nevertheless determined that the funds wired through the "daisy chain" were "proceeds" of a wire fraud scheme in a more metaphysical sense. According to the Third Circuit, the funds were the "proceeds" of a wire fraud scheme simply because the various wirings alleged in the indictment, considered as a whole, made the detection of the scheme by the authorities less likely, and thereby promoted the underlying tax fraud

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(Cont'd)
was sufficient to sustain the wire fraud charges, even though no additional funds were derived from the wire transfers. The Government argued that "for a charge of wire fraud there doesn't have to be proceeds . . . . you don't have to realize a gain to still be convicted of mail or wire fraud." (R 481-82).

committed by Morelli, although they did not cause the funds to be delivered to Morelli and his co-defendants (20a). Thus, in the Third Circuit's view, the wire transfers facilitated the entire fraudulent scheme by concealing it, and because Morelli's tax fraud was facilitated by the wire transfers, that tax fraud was transformed into a species of wire fraud, even though the wire fraud did not "result" in any "proceeds" as that term is commonly understood. By creating this theory of money laundering, the Court of Appeals effectively extended the reach of the money laundering statute to the proceeds of tax crimes, when those proceeds are later transferred by wire. This expansion of the crime of money laundering was simply not contemplated by Congress when it enacted 18 U.S.C. § 1956. The statute does not include tax evasion as a "specified unlawful activity." And the examples of money laundering activity cited in the committee reports relating to the enactment of 18 U.S.C. § 1956 make clear that Congress intended the statute to punish only activity involving a *res* or *corpus* of funds obtained by a distinct crime that is one of the crimes listed as "specified unlawful activity." *See* S. Rep. No. 433, 99th Cong. 2d Sess. (1986), pp. 11-12 (18 U.S.C. § 1956 not intended to apply to "run of the mill" tax evasion, because ordinary tax evasion does not itself generate "proceeds"); H.R. Rep. No. 855, 99th Cong., 2d Sess., pt. 1 (1986); *see United States v. Johnson*, 971 F.2d 562, 568 (10th Cir. 1992).

Under these circumstances, Morelli's sentencing pursuant to the money laundering guidelines can not stand. The Government did not prove that Morelli — or anyone else — laundered the "proceeds" of a wire fraud. At most, the Government showed that Morelli laundered the "proceeds" of a tax fraud. But tax fraud is not a "specified

unlawful activity" for the purposes of the federal money laundering statute, and laundering the proceeds of tax fraud is not a federal crime. By permitting Morelli's sentence under the money laundering guidelines to stand, the Court of Appeals effectively re-wrote the statute proscribing money laundering, extending the reach of that statute far beyond the limits contemplated by Congress.

II.

THE COURT OF APPEALS' OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS REGARDING THE DEFINITIONS OF "PROCEEDS" AND "SPECIFIED UNLAWFUL ACTIVITY" UNDER THE FEDERAL MONEY LAUNDERING STATUTE.

Numerous recent Court of Appeals decisions have stated or implied that a money laundering charge can be sustained only if the "specified unlawful activity" described in the charge itself generates a *res* or *corpus* of "proceeds," which are then "laundered." In addition, many Court of Appeals decisions have stated or implied that the "specified unlawful activity" must be separate and analytically distinct from the money laundering crime for which it serves as a predicate. The Court of Appeals' decision directly conflicts with both these lines of authority. It permits a money laundering charge to stand even where no "proceeds" were derived from a "specified unlawful activity" prior to the laundering charged in the indictment, and even where the "specified unlawful activity" and the money laundering charge are not distinct. The Court should issue the writ Morelli seeks, to resolve the conflict among the Circuit Courts as to what "proceeds" are and how they are created by "specified unlawful activity" for the purposes of the

money laundering statute, and to define the relationship between a "specified unlawful activity" and a corresponding money laundering charge.

In virtually every case decided before this one, including a case decided in the Third Circuit itself, the lower courts have described "proceeds" under the money laundering statute as a *corpus* of funds derived from a "specified unlawful activity," which is then "laundered" in a subsequent financial transaction. For example, in *United States v. Conley*, 37 F.3d 970, 980 (3d Cir. 1994), the Third Circuit held that

> proceeds are derived from an already completed offense, or a completed phase of an ongoing offense [and are then laundered] . . . . money, once collected from [illegal gambling activity that is a "specified unlawful activity"], became "proceeds of specified unlawful activity" . . . . Accordingly, any subsequent financial transaction involving those proceeds that promotes or furthers the illegal gambling business could form the basis of a charge of money laundering.

Similarly, the Fifth Circuit, in *United States v. Allen*, 76 F.3d 1348, 1361 (5th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 121 (1996), noted that a "fraudulent scheme produces proceeds at the latest when the scheme succeeds in disgorging the funds from the victim and placing them into the control of the perpetrators . . . ," and that "money *produced* from the defendants' fraud became proceeds" when it was delivered to them (emphasis added). In *United States v. Savage*, 67 F.3d 1432, 1442 (9th Cir. 1995), *cert.*

denied, __ U.S. __, 116 S. Ct. 964 (1996), the Ninth Circuit concluded that " 'proceeds' are funds obtained from prior, separate criminal activity." And in *United States v. Christo*, 129 F.3d 578, 580-81 (11th Cir. 1997), the Eleventh Circuit emphasized that, in the context of an alleged bank fraud, no money laundering could occur until a separate *res* or *corpus* of funds created by the defendant's bank fraud was moved through the banking system. *See also United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998) (predicate offense must produce proceeds in transactions distinct from money laundering transactions); *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir.) (where defendants obtained money from victims through mail fraud, and lulling letters in mail fraud scheme preceded wire transfers that were charged as money laundering, mail fraud scheme had produced "proceeds" for the purpose of money laundering statute), *cert. denied sub nom Wilkins v. United States*, 515 U.S. 1167 (1995); *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991) (Congress targeted "post-crime hiding of . . . illgotten gains" when it enacted proscriptions against money laundering), *cert. denied*, 505 U.S. 1223 (1992).

In the present case, the "wire fraud" described in the indictment and in the opinion below did not produce any *corpus* of funds that were subsequently laundered by Morelli's co-conspirators. As even the lower court acknowledged, the funds obtained by Morelli and his co-conspirators did not derive in any ordinary sense from the wirings charged as wire frauds in the indictment; rather, the funds were obtained, in each instance, from a tax fraud. (17a). Despite this fact, the Court of Appeals went on to find that the proceeds of Morelli's tax fraud scheme were *also, simultaneously* the proceeds of a wire fraud scheme "because the money" obtained by tax fraud "was the

proceeds of a fraud that was furthered by the prior wirings" in the scheme, which "served to promote and conceal each individual embezzlement of taxes" committed by Morelli and his co-defendants. (19-20a). In making this finding, the Court of Appeals' decision conflicts with numerous decisions of other Courts of Appeals, and with one of its own prior decisions.

In addition, in the lower courts, a number of cases have explained that the "specified unlawful activity" that generates a *res* or *corpus* of "proceeds" must do so "in acts distinct from the conduct that constitutes money laundering." *United States v. Mankarious*, *supra*, 151 F.3d at 705. That is, "a money laundering transaction must follow and be separate from any transaction necessary for the predicate offense to generate proceeds." *Mankarious*, 151 F.3d at 706; *and see United States v. Savage*, *supra*, 67 F.3d at 1441 ("[w]e conclude that 'proceeds' are funds obtained from prior, separate criminal activity"); *United States v. Johnson*, *supra*, 971 F.2d at 569 ("the money laundering statute was intended to be a separate crime distinct from the underlying offense that generated the money").

In this case, however, as the Court of Appeals acknowledged, the wirings that were the basis for the wire fraud consisted of all the wirings made in each set of "daisy chain" transactions, and were not, in any real sense, distinct from the money laundering transactions described in the indictment. In explaining its ruling, the court below wrote:

> Each wiring concealed and promoted each and every fraudulent series of transactions by making the entire scheme less detectable. Without the

> wirings to make it appear as if a series of distinct transactions between independent companies had occurred, the taxing authorities would have had a much easier time tracking down the perpetrators of the tax fraud scheme. . . . Since each individual fraudulent series of transactions other than the initial one was preceded by a wiring that promoted it, we think that, within each transaction series, the money was the proceeds of wire fraud at the time it came into the hands of the [conspiracy] in the form of the street company. As soon as one wiring took place, the entire tax fraud scheme became a wire fraud scheme. Since the very first series of transactions involved a wiring of the funds, every fraudulent acquisition of funds thereafter was an acquisition of funds through wire fraud (20a).

Thus, in the present case, there was no distinction between the "specified unlawful activity" described by the Court of Appeals and the money laundering crimes charged in the indictment. There was simply a series of wire transfers, all of which were intended, as part of a single scheme, to conceal the proceeds of Morelli's tax fraud. Each series of wirings that the Court of Appeals characterized as "wire fraud" predicates for subsequent money laundering charges were themselves transactions meant to "conceal" the proceeds of a previous tax fraud, and no "proceeds" other than the proceeds of Morelli's tax fraud were ever created by the wirings.

This Court's intervention is necessary to resolve the conflicts among the circuits and to establish a properly circumscribed definition of "proceeds" in accordance with

the clear intent of Congress, and to establish appropriate distinctions between conduct that is "specified unlawful activity" and conduct that is "money laundering" punishable pursuant to 18 U.S.C. § 1956. By granting the petition in this case, the Court will prevent any recurrence of the situation presented here, where the Government doubled Morelli's sentencing exposure by bootstrapping a tax fraud scheme into a wire fraud scheme, and then bootstrapping a wire fraud scheme into a money laundering scheme.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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